

North Carolina's Broadband Battle

BY REP. MARILYN AVILA (NC)

*"I am not a Luddite."*¹

So began my opening remarks at a marathon negotiation session with stakeholders representing a number of North Carolina cities and members of the telecommunications industry to develop state policy regarding municipal broadband.

What had brought all of these interested parties to the table?

Court Decision Opens the Door to Governmental Competition

North Carolina has a law call the *Umstead Act* that prevents the state from going into competition with private business, but that law does not apply to cities. Nonetheless, cities in our state are creatures of the legislature—they only have the authority granted to them by statute. So, in theory, at least, they would not be permitted to compete unless the statutes permitted that.

The statutes permit cities to construct "cable television systems". This provision was enacted by the legislature in 1971, at a time when there was no confusion as to what that term meant. In 2005, however, the North Carolina Court of Appeals issued a decision finding that the provision allowing cities to construct "cable television systems" should be construed to also authorize cities to build and operate basically any kind of wired system for any purpose - *BellSouth v. City of Laurinburg*, 168 N.C.App. 75, 606 S.E.2d 721 (2005). In a digital world where virtually any service can be provided using IP technology, this opened the floodgates for cities to provide telephone and broadband services, in addition to traditional video programming services. It also potentially opened the door to a wide range of other services, such as security and home monitoring services and private line telecommunications services.

The obvious problem this decision created was that, because competition was unleashed by the courts and not the legislature, cities were freed to compete against private industry without any rules ensuring fair competition with industry or with protections for taxpayers. For example, why would a city continue to be entitled to exemption from sales and other taxes with respect to a competitive, proprietary activity? Should cities be permitted to cross-subsidize their competitive activity with monopoly utility ratepayer funds? Should the taxpayers be a part of the decision to incur debt?

Various cities, urged on by broadband consultants, rushed to take advantage of the void—resulting in the construction of fiber-to-the-home systems in the City of Wilson ("Greenlight") and the City of Salisbury ("Fibrant"), as well as the acquisition of a defunct cable system by the Towns of Mooresville and Davidson

("MI-Connection"). In the case of Wilson and Salisbury, these cities were already being served by cable companies (Time Warner Cable) and incumbent telephone companies (CenturyLink and AT&T). These cities were hardly "unserved" or even broadband backwaters—instead they were being served by multiple providers over facilities comparable to those in the larger cities. These cities made the judgment that they would be better served by construction of fiber-to-the-home systems and since private industry was not willing to, in essence, overbuild themselves, the cities determined they should build the systems themselves and go into competition.

This issue was not confined to a handful of cities. In 2009, the League of Municipalities told a House Select Committee on High-Speed Internet that some 35 cities were in the process of evaluating whether to get into the business.

The Track Record of North Carolina Cities that are in Competition with Private Business

Municipal broadband proponents are fond of saying to their citizens that the broadband system with "pay for itself" and that no city funds would be used to build or operate that system. In North Carolina, we had real-time, real-world information with which to evaluate such claims.

The facts were not pretty. MI-Connection was formed in 2007 when Davidson and Mooresville agreed to issue some \$92 million in Certificates of Participation—a financing vehicle that allowed them to bypass going to the voters—to purchase a cable system that had been in bankruptcy. The system was (and is) losing money, and its citizens were being asked to fund these losses when they had been promised that the system would "pay for itself". These cities were forced to make up the deficit by raiding surplus monies, laying off employees, and imposing new taxes. Citizens in these communities were asking why they were in this business in the first place, and the leaders that had approved the purchase were left to say, "We owe the citizens an apology".

The City of Salisbury made similar statements to its citizens that the Fibrant network would pay for itself. In the original presentation on Fibrant, the city affirmatively stated that "No city funds would be used as working capital for system startup or any time". Yet as recently as September 6, 2011, the local newspaper reported on the city's plans to close Fibrant's operating deficit by taking a \$1.2 million loan from the city's water and sewer capital reserve fund.

The leaders of these cities are good people who undoubtedly have been making decisions out of the earnest belief they were

¹ any opponent of industrial change or innovation

advancing the interests of their citizens. They ultimately will be accountable to their citizens for their decisions (and, if fact, the leaders responsible for the MI-Connection decision were voted out of office). But, as an elected state official, I have concerns about the implications of their decisions for the state and for the citizens.

What's at Stake?

There are a variety of issues at stake in this debate relating to the State's finances and resources.

First, there is the issue of the financial stability of the cities who wish to compete. These cities need to be assured that they operate in an environment in which they can succeed and pay back the debt they have incurred.

Second, there is a risk that governmental competition, if allowed to go unchecked and without rules, will deter private investment and initiative as scarce investment dollars are spent where the prospect of earning a fair return is not diminished by competing with the government.

Third, it was important to me that the taxpayers have a say in their leader's decisions to incur debt for the purposes of entering into competitive enterprises.

Our Legislative Approach

The bill that was filed in North Carolina was titled the "Level Playing Field Bill" (HB 129). As its title suggests, the approach of the bill was not to prohibit cities from entering into the business, but rather to adopt rules to make them enter more or less as a market participant should they decide to compete with services already being provided by private business. Cities that wish to provide phone, cable TV, or broadband services in competition with private providers may do so, but only on terms that are roughly equivalent to those applicable to a private provider. These include requirements to:

1. Comply with laws and regulations applicable to private providers;
2. Not cross-subsidize their competitive activity using taxpayer or other public monies;
3. Not price below cost, after imputing costs that would be incurred by a private provider.
4. Not discriminate against private providers in access to rights-of-way.
5. Pay fees in lieu of taxes that are roughly equivalent to those paid by private business.

In addition to these "level playing field" requirements, the bill also required cities to submit the issue to a vote of the people. Also, the bill requires cities to explore the feasibility of entering into public-private partnerships before making the decision to "go it alone."

The bill expressly exempted those cities already competing from the new provisions.

The bill's competitive restrictions do not apply to the provision of services in unserved areas (i.e., areas where 50% of the households do not have access to broadband).


The bill also made clear that it does not apply to a city's operation of a communications network for its own internal governmental purposes such as police, fire, rescue, water, etc. (including smart grid services) or to a city's provision of free services such as free wireless.

Common Ground and Lessons Learned

Having been through the broadband wars, I would observe that there are a number of issues on which there is common ground.

- **Broadband is good; we need more of it.** Proponents of municipal broadband talk about the need to get broadband out to people who do not have access to it. This is an important issue of public policy, but it is a multi-dimensional problem, involving both supply (whether service is available) and demand (the financial ability and resources of citizens to subscribe) components—and it is an issue that is a different issue from whether there should be rules around local governments that want to enter into competition with private enterprise.
- **Voters should have a say.** These projects are, by any measure risky. They are expensive; they involve governmental involvement in a technology-based, rapidly changing arena; and they involve the government engaging as a competitor, not as a supplier of monopoly service.
- **Private industry should have the first opportunity to provide service.** After fighting any attempt to establish rules in this area for seven years, when finally forced to the table, the cities lobbying association suddenly favored a "right of first refusal" approach—i.e., an approach that ensures that private industry has the first opportunity to provide services that are desired by a community. This was a concept that, in the end, was endorsed by all the stakeholders to the bill.

Make no mistake, the opposition will be well organized and fierce. In North Carolina, the lead opponent was the League of Municipalities. Although unaffected, county governments voiced opposition as did some companies who are suppliers to municipalities. Former cable consultants also lobbied against the bill while creating a massive amount of misinformation through anti-cable/telecom bloggers not only from North Carolina but across the US.

If this policy is needed in your state, I recommend doing your homework and be prepared to stand strong. 



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